SUPREME COURT

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1267

ALPHONSE CUZZO,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1972

No.

ALPHONSE CUZZO,

*Petitioner,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

Petitioner, Alphonse Cuzzo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 16, 1973.

## Opinion

There was no opinion of the Court of Appeals. The Court of Appeals affirmed the judgment of the United States District Court for the Southern District of New York.

## Jurisdiction

The judgment of the Court of Appeals was entered on February 16, 1973. The jurisdiction of this court is in-

voked under Title 28 United States Code, §1254, subdivision (1).

## Question Presented

(1) Whether the application for the interception order of August 27, 1969 and the authorization to the applicant to make the said application were valid and in compliance with Title 18 U.S. Code §§ 2516 and 2518.

## Constitutional Provisions Involved

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## Statutes Involved

Title 18 U.S.C. § 2516 provides:

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal Agency having responsibility for the investigation of the

offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 and 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assaut), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under sections 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, sell-

ing or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Title 18 U.S.C. § 2518, Subdivision (1) provides as follows:

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication

shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the application to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge

for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

## Statement of the Case

### The Indictment

The indictment in the instant case was returned against 15 defendants and pleads four counts against each. All of the counts involve interstate gambling activity (16a *et seq.* of the original appendix). The defendant Cuzzo was found guilty on the first count which is a conspiracy count under Title 18 United States Code §§ 1952, 1084 and 2, and not guilty of the second, third and fourth counts.

The record in this case before the Court of Appeals consisted of an appendix and a supplemental appendix filed by the defendants and the original record.

## Statement of Facts

The sole question to be raised on this appeal arose through a motion to suppress electronically seized evidence as not having been seized or authorized in accordance with the provisions of Title 18 United States Code §§ 2516 and 2518. This question was originally raised on a pre-trial motion to suppress all wire tap evidence. On the argument of that motion the Government stated

that in the absence of the wire tap evidence they would not have a case against the defendants. The motion to suppress was denied.

Because of the fact that the only question to be raised on appeal was the propriety of the denial of the motion to suppress, it was agreed between the Government and the attorneys for the defendants that a stipulation would be entered into, setting forth the facts which the Government would, in the event of calling witnesses and offering exhibits, have put into the record, without conceding the truth thereof. Also it was agreed that to facilitate matters all defendants would waive a jury trial. It was agreed that the stipulation thus entered into would constitute the evidence upon which the trial judge would decide the innocence or guilt of the defendants. A trial was had before the Honorable Sylvester J. Ryan, District Judge in the manner described on May 12, 1972. That trial did not, however, include any disposition concerning the defendant, Cuzzo, since at that time he refused to sign the stipulation and waive a jury trial. (The defendant Lattanzio also refused to sign the stipulation at that time and to waive a jury trial. This briefer is unaware of what has occurred since that time in the case of Lattanzio.) All other defendants at that time were found guilty of the first count, and not guilty of the remaining three counts.

Thereafter the defendant, Cuzzo changed his mind and agreed to the stipulation already on file, and also was found guilty on count no. 1 and not guilty on counts 2, 3 and 4 (Supplemental Appendix 3a).

The occasion for the existence of an appendix and a supplemental appendix, and for the use of these terms, is as follows. During the period after the finding of guilty of the 13 defendants and before the finding as to the de-

fendant, Cuzzo, the 13 defendants had printed an appendix which was to be used in presenting their appeal to this court. Thereafter those defendants failed to proceed with their appeal and their appeal was dismissed. In the meantime, however, the defendant, Cuzzo was found guilty, and filed a notice of appeal and is proceeding with his appeal. The Government was kind enough to stipulate with counsel that the previously filed appendix on behalf of the 13 defendants, and the supplemental appendix containing matters relating peculiarly to the defendant, Cuzzo and the papers submitted on the motion to suppress, would together serve as the appendix in this case. Hence page references will be to appendix and supplemental appendix respectively.

The narrow issue then is the propriety of the seizure of the wire tap evidence, and specifically the propriety of the authorization. The defendants made a motion based upon the decision of *United States* v. *Robinson,* to suppress all wire tap evidence (17a *et seq.* of the supplemental appendix). The Government responded to this motion with an affidavit of Sol Lindenbaum, Esq. (33a *et seq.* supplemental appendix), and a memorandum of law stating the Government's position, and including certain statements of fact, which is therefore included in the supplemental appendix at 20a *et seq.* There were here involved 4 orders and 4 separate authorizations to apply for such orders. The first authorization is dated July 2, 1969 and it authorizes Will Wilson, Esq., Ass't. Attorney General to give authorization to Joseph F. Lynch, Esq. to apply for an interception order. This authorization resulted in the interception order signed by Judge Cannella on July 28, 1969. We are told in the affidavit of Mr. Lindenbaum that the Attorney General himself initialed the July 2nd authorization at the upper left hand portion thereof over the typed words "John M. Mitchcell, Attorney Gen-

eral" (33a, 36a). The next authorization was dated August 8 and it authorizes Will Wilson, Esq. to give authorization to Joseph F. Lynch, Esq. to make application for an interception order. Here again we are told by Mr. Lindenbaum that the initials appearing over the typewritten name were personally affixed by the Attorney General (33a, 37a of the supplemental appendix). So also is it with the authorization of the Attorney General dated September 12, 1969. Here, too, we are told that the Attorney General affixed his own initials (34a, 39a supplemental appendix). This authorization resulted in an interception order dated September 12, 1969.

The letter of authorization granting to Will Wilson power to authorize Gerald T. McGuire to make application for an interception order dated August 27, 1969 does not, however, bear the initials of the Attorney General. Mr. Lindenbaum "caused his initials to be placed on the memorandum to Will Wilson" (34a supplemental appendix). It is the stance of the Government as to this authorization that "to insure continuity of procedure, the Attorney General authorized Sol Lindenbaum to act for him in cases when he was unavailable" (27a of the supplemental appendix). The affidavit of Mr. Lindenbaum says that on August 27, 1969 he contacted, Attorney General John M. Mitchell by telephone and advised him orally of the substance of a memorandum of recommendation received from the Criminal Division and of a proposed memorandum of approval from him to Will Wilson. Mr. Lindenbaum said that the Attorney General orally approved of the recommendation of the Criminal Division. It is clear that Mr. Mitchell did not see either the memorandum of recommendation of the Criminal Division, or the memorandum of approval by the Attorney General to Will Wilson, Esq. It is also clear that they were not read to Mr. Mitchell verbatim. No where in the affidavit of Mr. Lin-

denbaum is there a statement that Mr. Mitchell was unavailable or the nature of any claimed unavailability. On the basis of the document just discussed there was prepared in the Department of Justice a letter of authorization to Gerald T. McGuire, Esq. in New York dated August 27, 1969, which was attached to an application to United States District Judge Irving Ben Cooper. The said District Judge signed an order authorizing continued interception of wire communication on that date, that is to say August 27, 1969. Contained in the said order is the following recital:

> "The Federal Bureau of Investigation, United States Department of Justice, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, who has been specially designated in this proceeding by the Attorney General of the United States to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code."

The application for the order in its paragraph "2" contains the following language:

> "2. The Attorney General of the United States has specially designated in this proceeding the Assistant Attorney General for the Criminal Division, Department of Justice, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, and the Assistant Attorney General for the Criminal Division has, in turn, authorized me to make application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Attachment A."

It is the defendant, Cuzzo's contention that the procedure followed here was not adequate to supply the requirements mandated by §§ 2516 and 2518 of Title 18 of the United States Code.

## Reasons for Granting the Writ

The petitioner urges that the Court of Appeals in this case has decided certain of the questions raised in a way which is in conflict with decisions of the other Court of Appeals, and has decided important questions of federal law, and important federal constitutional questions, which have not been, but should be passed upon by this court. The questions raised by this petition are segregated in the point which follows.

## POINT I

**The procedure here followed in authorizing the application for the interception order of August 27, 1969 fails to meet the standards mandated by 18 United States Code §§ 2516 and 2518.**

The legislative history of sections 2516 and 2518 of Title 18 United States Code (indeed of all of the Omnibus Crime and Safe Streets Act in its impact on oral and electronic surveillance) tells us that the effort of Congress was to draft an act which would comply totally with the "constitutional standards" set forth in *Berger* v. *New York,* 388 U.S. 41, 87 S. Ct. 1873 and *Katz* v. *United States,* 389 U.S. 347, 88 S. Ct. 507 (U.S. Code Congressional and Administrative News, 90th Congress, Second Session, Volume 2, pages 2161 and 2191). Both Congress and the draftsmen of this section must of necessity been

aware of the stern warning in *Berger* which was as follows:

> "It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the 'fruits' of eavesdropping devices are barred under the amendment."

Therefore Congress was addressing itself to an almost impossible task, to wit, to preparing a law which would comply rigidly with Fourth Amendment standards as the same are interpreted by *Berger* and *Katz*. This was a stern challenge. Accordingly the Congress enacted a law which, in dealing with electronic interception, erected procedural standards which both in form and in substance, Congress intended to be rigid, and to be rigidly complied with. It is submitted therefor that approximate compliance with § 2516 and § 2518 is no compliance at all.

Thus it has been held in a number of cases.

*United States* v. *Giordano*, 12 CLR 2204;
*United States* v. *Vasquez*, 12 CLR 2137;
*United States* v. *Robinson*, 10 CLR 2281;
*United States* v. *Aquino*, 338 F. Supp. 1080;
*United States* v. *Narducci*, 341 F. Supp. 1107;
*United States* v. *La Gorga*, 340 F. Supp. 1397;
*United States* v. *Focarile*, 340 F. Supp. 1033;
*United States* v. *Baldassari*, 33 F. Supp. 904;
*United States* v. *Cihal*, 336 F. Supp. 261.

Seemingly contra is *United States* v. *Ceraso*, 11 CLR 2513 where it was held permissible for Sol Lindenbaum, Esq. to affix the Attorney General's initials to a memorandum authorizing Will Wilson to authorize an application for a wiretap order.

In *United States* v. *Pisacano,* 11 CLR 2081, the matter of the authorization procedure was raised on an appeal from a denial of a motion for leave to withdraw a plea of guilty. Clearly the defendant had not prior to his plea of guilty raised the matter of the authorization procedure. This Court was not therefor faced with a motion to suppress, or an appeal from a conviction after the denial of a motion to suppress. The Court did, however, discuss the principles applicable to the authorization procedure, since as the Court observed, it would be an abuse of discretion to refuse to allow withdrawal of a plea of guilty if the conviction could not later survive collateral attack. There the Government contended that since April 11, 1967 Mr. Lindenbaum regularly acted for the Attorney General in designating Will Wilson as the Assistant Attorney General who had the power to authorize application for wiretap orders. While the Court did not face directly a suppression question, it did set to some degree its stamp of approval on this procedure when it held, "We are thus not at all convinced that if this case had gone to trial, and the court had refused to suppress evidence obtained by the wiretaps, we would have suppressed • • •"

The Government's stance in the instant case is somewhat different here than in *Pisacano* and the defendant here attacks the August 27, 1969 authorization for reasons not raised in *Pisacano.*

In the instant case the Government does not claim, as it did in pre-*Robinson* cases, that Mr. Lindenbaum had general authority as the Attorney General's *alter ego.* The claim advanced in this case is not that "the Attorney General could delegate to any official in the Department the authorize electronic interception applications" (25a supplemental appendix). On the same page it is made clear that the Government contends "that Sol Lindenbaum, the Executive Assistant, stands in a special rela-

tionship to the Attorney General which makes him, in effect, the *alter ego* of the Attorney General with respect to these matters, *when the Attorney General is not available*" (emphasis added).

This is a whole new contention. The minimum requirement now is that Mr. Lindenbaum should have set forth in his affidavit in opposition to the suppression motion (1) that fact that Mr. Mitchell was not available (2) detailed facts demonstrating and explaining the Attorney General's unavailability. Mr. Lindenbaum's affidavit is entirely silent on the subject of the Attorney General's availability. The fact that he could be reached by telephone would seem to indicate that the Attorney General was available. We are not told whether it was in Washington or elsewhere. We are told nothing. If the Attorney General was in fact available, even according to the Government's contention, Mr. Lindenbaum had no authority to act for him.

Nor can it be said that the Attorney General himself acted in the matter of this authorization. Mr. Lindenbaum tells us that he "advised him orally of the substance of a memorandum of recommendation received from the Criminal Division and of a proposed memorandum of approval from him to Will Wilson" (33a, 34a, supplemental appendix). It seems clear that the minimum requirement for making the delegation the personal action of the Attorney General, would be that the two documents should have been read to him so that he could exercise his own independent judgment on the matter.

More important § 2518 subdivision (1) (a) requires that the application to the judge shall contain the following information:

> "(a) The identity of the investigative or law enforcement officer making the application, and the officer authorizing the application."

The purpose of setting forth this information is to permit the judge to whom the application is made to determine whether § 2516 and § 2518 have been complied with. This is not a matter for the determination of the applicant or of the Attorney General. It is solely the judge who must decide the matter of validity of authorization. Therefore it is not sufficient to set forth in the application a conclusion of the applicant, or a conclusory statement by the applicant. The facts as to the authorization must be set forth in detail so that the judge may draw his conclusion based upon the facts revealed.

*Berger, supra* in speaking of constitutional requirements held, "The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping".

Paragraph "2" of the application is the only recital contained therein dealing with the authorization. That paragraph reads as follows:

> "2. The Attorney General of the United States has especially designated in this proceeding the Assistant Attorney General for the Criminal Division, Department of Justice, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, and the Assistant Attorney General for the Criminal Division has, in turn, authorized me to make application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Attachment A".

This paragraph contains only the barest of conclusions and no statements of fact. In fact it is the identical para-

graph "2" which was used in all four applications. It was used therefor both when the Attorney General initialed the memorandum, and here he never saw the memorandum, and someone else caused his initials to be affixed. The very least that would satisfy the cited subdivision would be a recital of the transaction setting forth in detail the facts briefly touched on in Mr. Lindenbaum's affidavit, plus detailed facts concerning the Attorney General's whereabouts, that he was unavailable, and exploring the nature and cause of his unavailability.

Exactly in point and sustaining the argument explored in the last paragraph is *United States* v. *Focarile,* 340 F. Supp. 1033.

This point is made forcefully, too, in the legislative history. The following appears in the Senate Report concerning §§ 2516 and 2518:

> "The application must be made to a Federal judge of competent jurisdiction, as defined in section 2510 (9) discussed above. The application must conform to section 2518, discussed below. This provision is in accord with the practical and constitutional demand that a neutral and detached authority be interposed between the law enforcement officers and the citizen (*Berger* v. *New York,* 87 S. Ct. 1873, 388 U.S. 41, 54 (1967); *Katz* v. *United States,* 88 S. Ct. 507, 389 U.S. 347 (1967)" (U.S. Code Congressional and Administrative News 90th Congress Second Session Volume 2 page 2185).

One of the important questions to be determined by the judge receiving the application is whether the applicant for a wiretap order is duly authorized under the statute to make the application. The judge can hardly serve as such a "neutral and detached authority" if he is compelled

to rely on a conclusion of the law enforcement officer on this question, and is afforded no facts upon which to base an independent judgment.

It is submitted that in the case of the August 27, 1969 application and order (1) the applicant was not duly authorized (2) the applicant made no attempt to present to the judge receiving the application, any facts whatever tending to sustain the legal conclusion that he was authorized to make the application.

## CONCLUSION

**The conviction should be reversed, the motion to suppress the wiretap evidence granted and the indictment dismissed.**

Respectfully submitted,

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[APPENDIX FOLLOWS]

# APPENDIX

The judgment of the United States District Court was affirmed from the bench by the United States Court of Appeals for the Second Circuit.

A mandate has been issued and the defendant has surrendered. No written judgment of conviction has been prepared, consequently petitioner is unable to append a copy of the judgment of conviction.